

FIRST AMENDMENT TO
MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF ALBUQUERQUE,
COUNTY OF BERNALILLO AND THE ALBUQUERQUE-BERNALILLO WATER
UTILITY AUTHORITY REGARDING ADOPTION OF CITY WATER AND
WASTEWATER UTILITY POLICIES AND PROCEDURES

This First Amendment to the January 21st, 2004 Memorandum of Understanding (MOU) between the City of Albuquerque (“City”), the County of Bernalillo (“County”), and the Albuquerque-Bernalillo Water Utility Authority (“Authority”) is entered into this _____ day of _____, 2004.

WHEREAS, New Mexico Senate Bill 887 (Laws 2003, Chapter 437, codified as NMSA 1978, § 72-1-10) created the Albuquerque-Bernalillo Water Utility Authority, effective June 21, 2003;

WHEREAS, the Authority is a “joint agency of the two governments [City and County] and is subject to the state Procurement Code and other applicable state laws.” NMSA 1978, § 72-1-10 (2003);

WHEREAS, the Authority is charged with “administer[ing] the water and wastewater utility of Albuquerque and Bernalillo county.” NMSA 1978, § 72-1-10 (2003);

WHEREAS, the legislation creating the Authority requires that “[a]ll functions, appropriations, money, records, equipment and other real and personal property pertaining to the Albuquerque water and wastewater utility shall be transferred to the Albuquerque-Bernalillo water utility authority.” NMSA 1978, § 72-1-10 (2003);

WHEREAS, the New Mexico Legislature also provided for the Authority to issue revenue bonds to refund City bonds pledged by property taxes and that all contractual obligations of the utility under City ownership and management would be binding on the Authority. NMSA 1978, § 72-1-10 (2003);

WHEREAS, the legislation creating the Authority required the New Mexico Public Regulation Commission to audit the utility prior to transfer of the money, assets and debt of the Albuquerque water and wastewater utility, NMSA 1978, § 72-1-10 (2003); this audit was completed by the Public Regulation Commission and delivered to the Legislature on December 17 2003;

WHEREAS, the City and County are entering into a JPA under the New Mexico Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 to 11-1-7 (1999), with the intent to supplement the Authority’s power to issue revenue bonds with the common powers of the City and County, so that longer term needs of the utility for capital outlay and other expansions of the utility may be met;

WHEREAS, the Authority anticipates it will promulgate regulations governing the issuance of its revenue bonds in coming weeks and that the regulations will also address financial management of bonds or other obligations issued by the Authority under the JPA;

WHEREAS, the Authority is in the process of developing an administrative and operating structure for the utility;

WHEREAS, the Authority is also in the process of developing comprehensive policies and procedures regarding all aspects of the functioning of the utility;

WHEREAS, the utility continues to be managed and operated in accordance with all existing and binding contracts and codified and uncoded policies and procedures of the City;

WHEREAS, the City, County and Authority agree that transition planning is necessary to facilitate the transition and that plan should include the Authority's consideration of current policies and procedures in developing the Authority's policies and procedures, temporarily adopting certain current policies and procedures, and inclusion of the Authority on fiscal and other management matters prior to transfer;

WHEREAS, the City, County and Authority entered into the MOU on January 21, 2004, for the purpose, among other things, of temporarily adopting certain City policies and procedures; and

WHEREAS, the Attorney General of the State of New Mexico has determined that the Authority is the governing body of the water and wastewater utility and is independently charged with administering the utility, including the determination and imposition of rates and policy; and

WHEREAS, the MOU requires modification to recognize additional policies and procedures and to further facilitate the transition of City and County assets under the control of the Authority.

IT IS AGREED between the City, County and Authority that:

1. The Authority shall hereinafter be referred to as the Albuquerque Bernalillo County Water Utility Authority.

2. Definitions.

a. System. The public utility designated as the City's water system and sanitary sewer system, as required to be transferred to the Authority in accordance with NMSA 1978, § 72-1-10 (2003), and consisting of all properties, real, personal, mixed or otherwise, now owned or hereafter acquired by the City, County or Authority through purchase, construction or otherwise, including all extensions, enlargements and improvements of or to the water and sanitary sewer system and used in connection with or relating to, and any other related activity or enterprise of the City, County or Authority designated by the City, County or Authority as part of the water and sanitary sewer system, wherever situated.

b. Gross revenues. All income and revenues directly or indirectly derived by the City from the operation of that part of the System owned by the City prior to the transfer, or any portion of that part of the System owned by the City prior to transfer, and includes, without limitation, all revenues received by the City from the System and from the sale and use of water, water services or facilities, sewer service or facilities or any other service, commodity or facility or any combination thereof furnished to the inhabitants of the City and County by means of the System. Such term also includes:

(1) All income derived from the investment of any such money including surplus net revenues,

(2) Money released from any rebate programs, and
(3) Property insurance proceeds that are not necessary to restore or replace the property lost or damaged and the proceeds of the sale or other disposition of any part of the System owned by the City prior to transfer.

c. Net revenues. The gross revenues after deducting operation and maintenance expenses.

d. Operation and maintenance expenses. All reasonable and necessary current expenses of that part of the System owned by the City prior to transfer, paid or accrued, related to operating, maintaining and repairing that part of the System owned by the City prior to transfer. Without limiting the generality of the foregoing and only as it applies to that part of the System owned by the City prior to transfer, this shall include:

(1) Legal and overhead direct & indirect expenses of the various operating units directly related and reasonably allocable to the administration of the System,

(2) Insurance premiums for the System, including, without limitation, premiums for property insurance, public liability insurance and worker's compensation insurance, whether or not self-funded,

(3) Premiums, expenses and other costs for credit facilities,

(4) All expenses other than expenses paid from the proceeds of bonds and other similar indebtedness payable solely or primarily from net revenues of the System,

(5) Costs of audits of the books and accounts of the System,

(6) Amounts required to make rebate payments to the United States Government that relate to the System,

(7) Salaries including employee benefits and payroll taxes, administrative expenses, labor costs, surety bonds and the cost of materials and supplies used for or in connection with the current operation of the System. Operation and maintenance expenses do not include any allowance for depreciation, liabilities incurred by the City as a result of their negligence or other misconduct in the operation of the System or any charges for the accumulation of reserves for capital replacements.

(8) All costs included in the FY/05 budget for the water utility shall be considered the operation and maintenance expense under this agreement, subject to negotiation.

3. City Documentation of Contracts, Policies and Procedures. No later than thirty days from the execution of this MOU, the City will provide to the Authority copies of all contracts, including leases, pertaining to the management, operation and maintenance of the System and copies of all policies and procedures that apply to the System. Any policy or procedure not provided pursuant to this paragraph will not be considered by the Authority in its development of its own policies and procedures, unless it is provided to the Authority in accordance with Section 8 of this MOU.

4. Authority's Assumption of City Contracts. Upon transfer of the System to the Authority, the System will continue to be managed and operated in accordance with existing contracts. The Authority recognizes it will be successor in interest on such contracts.

5. Authority's Temporary Adoption of City Policies and Procedures; Authority Promulgation of Policy and Procedure Post Transfer.

a. Upon transfer of the System to the Authority, if the Authority has not implemented its own policies and procedures, the System will continue to be managed and operated in accordance with the City's codified and uncoded, written and duly adopted, policies and procedures pertaining to rates, water resource management, personnel and the physical operation and maintenance of the system, except as expressly noted in Section 6, in effect as of May 1, 2003, until the implementation date of the Authority's own policies and procedures. The policies and procedures to be adopted include:

- rates,
- conservation, including rebate programs,
- water resource management and development,
- water and wastewater system planning, including line extension policies, except as identified below,
- water quality,
- water and wastewater system performance,
- utility easement and right-of-way agreements,
- street excavation,
- permitting,
- risk management and safety,
- customer service,
- personnel and benefits, with express recognition that City employees shall remain employees of the City in accordance with the terms of this MOU,
- personnel, training and certification,
- procurement,
- accounting, travel, payroll and payables,
- construction,
- budgeting, including Capital Improvement Program monies,
- all plant operating procedures and system maintenance,
- any and all emergency and emergency response plans.

b. Upon transfer of the System to the Authority, the Authority shall be the exclusive policy making body in all aspects of the operation of the System, including but not limited to rates, procedures and the areas identified in this paragraph above. The Authority shall not be bound to recognize any City rate, policy or procedure, effectuated after the transfer date, by any means (including administrative instruction) and purporting to implicate or compel a change in a water or wastewater utility rates, policy or procedure. The process for consideration of City policy or procedures adopted post transfer, shall be as set out in paragraph 8 below.

6. Excepted Policies and Procedures. Policies and procedures excepted from the temporary adoption of City policies and procedures in Section 5 include:

a. Capital Needs Considerations. Capital needs considerations for the System will be determined by the Authority. Funding of capital needs will be provided, in whole or in part, by the Authority, through its statutory power or its power created by the JOINT POWERS AGREEMENT BETWEEN THE CITY OF ALBUQUERQUE AND COUNTY OF BERNALILLO REGARDING ALBUQUERQUE-BERNALILLO WATER UTILITY AUTHORITY passed by the Authority on December 17, 2003.

b. Policies and procedures executed or adopted by the City after May 1, 2003.

c. Policy No. 14.A.2, of Policy No. 14 Lines Outside the City Limits (City of Albuquerque Enactment Nos. 20-1984 and No. 88-1992) and any other policy or procedure making a distinction between within and without the City limits.

7. Transfer of Personnel and Functions.

a. On or before July 1, 2004, the City shall identify, separate and transfer from the Public Works Department, the water and wastewater utility, including all enterprise functions and employees, in particular those functions and employees in the following divisions: Customer Service, Water, Wastewater, Finance, Utility Development, Water Resources, Information Technology and Utility Design. These functions and employees shall be transferred into a separate operating department (hereinafter referred to as the "Water Utility Department") of the City for a term not to exceed the life of the MOU and any amendments thereto. The Water Utility Department shall report to the City and the Authority, as more fully discussed below.

b. The Mayor of the City or his designee shall be the spokesperson for the Water Utility Department for a term not to exceed the life of the MOU and any amendments thereto.

c. Within thirty (30) days of the date of this First Amendment to the MOU, the City and the Authority shall initiate a solicitation and selection process for the retention of a general manager of the Water Utility Department and the utility functions identified above. It is the intent of the parties that such individual would be appointed as general manager within one hundred and eighty (180) days of the date of this First Amendment to the MOU. The City, County and Authority agree that such individual shall report to the City administration for day-to-day operations, including routine operation, maintenance, repair and personnel administration (i.e. routine hires, grievance and disciplinary actions), and to the Authority and its executive director for all policy (including line extension policy), budget, rate, personnel reorganizations, unbudgeted intra-year positions, negotiation or renegotiation of labor contracts and litigation.

d. On or before July 1, 2004, the County shall identify employees and functions dedicated to water and wastewater facilities owned and operated by the County and establish a reporting relationship with the Authority. The County further agrees to place any and all funds, regardless of source, related to the County's operation of water and wastewater facilities, into an account, separate and apart from any and all other County funds, and maintain such account and funds in accordance with generally accepted accounting principles.

e. Any contract or other agreement which purports to bind the Authority or Water Utility Department (after July 1, 2004) (1) for purchases that require Chief Administrative Officer approval in the City Purchasing Ordinance and Regulations or (2) for change orders to any contract or other agreement that require Chief Administrative Officer approval or (3) to settlements presented to the City's Risk Management Claims Review Committee (or successor committee) or (4) to any other settlement of litigation requiring the payment of any sum in excess of \$15,000, shall require the review and joint approval of the City Administration and the Authority executive director.

8. Process for Consideration of Other Policies or Procedures. The City, County or Authority, or any authorized representative of the City, County or Authority may propose for Authority consideration for temporary adoption any policy or procedure either 1) not recognized in or 2) modified from those identified in Sections 5 and 6 of this agreement. Such proposals may also be made for consideration by the Authority in its development of its own policies and procedures in conjunction with the policies and procedures provided under Section 4 of this agreement; provided, however, proposals must be presented within 30 days of execution of this MOU.

9. Fiscal Management of the System. For the term of this MOU and any amendments thereto, the City shall:

a. Report issues associated with management and operation of the System to the Authority and abide by decisions of the Authority regarding those issues.

b. Prepare monthly reports of the System's gross revenues, operating and maintenance expenses and net revenues.

c. Prepare monthly reports of the System's major projects, both planned and in progress, and including cost projections.

d. Prepare monthly financial reports showing receipts, expenditures and balances for each account or fund associated with any bond issuance or other obligation related to the System.

e. Prepare the Comprehensive Annual Financial Report.

f. Prepare the Annual Information Statement.

g. The City will assume the following fiscal responsibilities:

(1) On or before July 1, 2004, the City shall place any and all funds, regardless of source, related to the City's operation of water and wastewater utility facilities, into an account(s), separate and apart from any and all other City funds, and maintain such account(s) and fund(s) in accordance with generally accepted accounting principles.

(2) Provide strict accountability of all receipts and disbursement for the System,

(3) Pay all bond payments and other obligations and expenses related thereto in accordance with the Joint Powers Agreement,

(4) Invest operating and excess funds not required for current operations in accordance with applicable laws.

h. Work with the Authority in addressing any personnel matters, exclusive of grievance and disciplinary action, which shall include personnel reorganizations, negotiation or renegotiation of labor contracts and Risk Management and other litigation settlement agreements.

10. Issuance of Revenue Bonds. The City, County and Authority agree that the procedural and substantive provisions of the Municipal Revenue Bond Act, Section 3-31-1 to 3-31-12 NMSA 1978, as amended, and of the County Revenue Bond Act, Section 4-62-1 to 4-62-10, NMSA 1978, as amended, governing issuance of revenue bonds by the City and County

respectively, shall be followed by the Authority in issuing bonds or other obligations payable from net revenues of the System.

11. Franchise Fees and Indirect Cost. The Authority agrees to pay a payment in lieu of taxes in the form of a franchise fee to the City in the amount of 4% of gross revenues, (as gross revenue is defined in Section 13-4-4-3 ROA 1994), and indirect overhead to the City as negotiated and approved in the annual operating budget. No other costs shall be assessed to the Authority by the City or the County unless approved in the operating budget or by the executive director of the Authority. The franchise fee and any indirect overhead based on the cost allocation plan shall be subject to audit by the Authority; any unauthorized cost assessment by the City or County shall be borne by the assessing agency (City or County).

12. Transfer of County Assets. Upon the effective date of this First Amendment to the MOU, any County owned water and wastewater assets located in the Middle Rio Grande Basin, located within reasonable proximity of the System and capable of interconnection to the existing System, including, but not limited to, all properties, real, personal, mixed or otherwise, and all extensions, enlargements and improvements thereto, including facilities and water rights used by the County for municipal, residential, commercial and industrial purposes excluding stand alone water wells and attached facilities providing irrigation water, shall be transferred to the Authority.

13. Term. This MOU shall remain in force and effect until December 31, 2006, unless sooner terminated by agreement of the City, County and Authority.

IN WITNESS WHEREOF, each Party has executed this agreement on the date first written above.

CITY OF ALBUQUERQUE

By: _____
Jay Czar, Chief Administrative Officer

Date: _____

APPROVED AS TO FORM:

Robert M. White, City Attorney

ATTEST:

City Clerk

COUNTY OF BERNALILLO

By: _____
Thaddeus Lucero, County Manager

Date: _____

APPROVED AS TO FORM:

Tito Chavez, County Attorney

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

By: _____
Alan Armijo, Chairman

Date: _____

ATTEST:

Mark Sanchez, Executive Director